(13)

No. 88-2109

In the Supreme Court of the United States

OCTOBER TERM, 1989

KANSAS AND MISSOURI, ETC., PETITIONERS

v.

UTILICORP UNITED INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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35 pp

QUESTION PRESENTED

Whether the Court should recognize an exception to the pass-on rule of *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), and *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977)—that only an overcharged direct purchaser, and not a subsequent indirect purchaser, is entitled to recover antitrust damages—where the direct purchaser is required by regulation to pass on the full amount of any illegal overcharge to the indirect purchaser, or where the pass on is easily proven.

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INTEREST OF THE UNITED STATES

The United States and the Federal Trade Commission has primary responsibility for enforcing the federal antitrust laws. This case presents the question whether the Clayton Act, which has been construed to provide that only a direct purchaser may recover damages for an unlawful overcharge, nevertheless permits indirect purchasers to recover damages if the injured direct purchaser passes the overcharge on to them. The Court's resolution of that question may affect both federal antitrust enforcement and the extent to which private enforcement of the federal antitrust laws achieves its intended purposes; as a result, the United States and the Federal Trade Commission have a significant interest in its correct resolution. The Court previously recognized that interest when, at the petition stage, it requested the views of the United States.

STATEMENT

1. Respondent is a public utility. It and another utility (Kansas Power & Light Company) purchased natural gas from a pipeline company for their own use and for delivery to their customers. The utilities, along with other purchasers of natural gas from the pipeline, sued the pipeline and five natural gas producing entities under Section 4 of the Clayton Act, 15 U.S.C. 15. The utilities alleged that the pipeline and the producers had conspired to inflate prices in violation of the Sherman Act. They sought as damages both the amount of the overcharge and lost profits attributable to the decrease in the quantity of natural gas demanded by the utilities' customers as a result of the higher prices.

Petitioners Kansas and Missouri subsequently brought *parens patriae* actions against the same pipeline-producer defendants on behalf of residential consumers in those States who had purchased natural gas from the utilities.[1] These actions were consolidated with the utilities' suit.

2. Defendants answered that the utilities lacked standing to bring an antitrust suit. According to the pipeline-producers, the utilities had passed on any illegal price increase to their customers. This pass on was assertedly required by state regulations and tariffs filed with state utility commissions. Pet. 4.

The utilities moved for partial summary judgment with respect to this defense, and the district court granted their motions. It noted that in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), this Court held that a direct purchaser is damaged within the meaning of Section 4 of the Clayton Act, 15 U.S.C. 15, to the full extent of an overcharge even if the entire over-

[1] The residential consumers on whose behalf petitioners sued include customers of other utilities but exclude the utilities' customers in other States. Petitioners did not sue on behalf of the utilities' customers who are not natural persons.

Petitioners also sued in a representative capacity on behalf of governmental entities that purchased natural gas from the pipeline. This aspect of the case is not at issue here.

charge is passed on to customers. Pet. App. A25-A27. The district court further observed that although *Hanover Shoe* involved the defensive use of a pass-on theory, this Court later held in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), that offensive use of the pass-on theory by indirect purchasers seeking to prove damages is also barred. Pet. App. A27.

The district court acknowledged that the extent to which the utilities in this case passed on the allegedly illegal overcharge was a disputed factual issue; however, the court concluded that the pass-on defense would be barred even "if the facts establish that the rate systems governing the utilities permitted a total pass-through of any price increase." Pet. App. A33. Although this Court had suggested that the pass-on rule might not apply when an overcharged buyer has a pre-existing "cost-plus" contract for a fixed quantity, *Illinois Brick*, 431 U.S. at 736; see *Hanover Shoe*, 392 U.S. at 494, the district court held this possible exception inapplicable because "consumer demand for natural gas is governed neither by a fixed-quantity contract nor by anything resembling its 'functional equivalent.'" Pet. App. A34. Recognizing that the utilities' motions "were, in reality, motions to dismiss the States of Kansas and Missouri in their *parens patriae* capacity," the district court dismissed petitioners' *parens patriae* claims. Pet. App. A38.

In its ruling, the district court relied on *Illinois ex rel. Hartigan* v. *Panhandle Eastern Pipe Line Co.*, 839 F.2d 1206 (1988), where a panel of the Seventh Circuit had on "almost identical facts" rejected a similar pass-on contention. Pet. App. A36. After the district court rendered its decision, the Seventh Circuit granted rehearing en banc in *Panhandle Eastern*. In response, the district court certified to the Tenth Circuit the following question for interlocutory appeal:

> In a private antitrust action under 15 U.S.C. § 15 involving claims of price fixing against the producers of natural gas, is a State a proper plaintiff as *parens*

> *patriae* for its citizens who paid inflated prices for natural gas, when the lawsuit already includes as plaintiffs those public utilities who paid the inflated prices upon direct purchase from the producers and who subsequently passed on most or all of the price increase to the citizens of the State?

Pet. App. A41.

3. The court of appeals answered the certified question in the negative. In its view, the reasoning of *Hanover Shoe* and *Illinois Brick* requires that the cost-plus exception—if there is one[2]—be limited to cases involving a pre-existing contract for a fixed quantity. Pet. App. A8. In the absence of a fixed quantity provision, the court reasoned, the utilities would presumably suffer injury from the decreased demand for natural gas resulting from the higher price even if they passed on the entire overcharge. Pet. App. A12-A13. Consequently, it would still be necessary to apportion damages between the direct and indirect purchasers, were the latter permitted to recover. Pet. App. A14. The court of appeals therefore concluded that even if there were "a perfect and provable pass-on of the allegedly illegal overcharge" in this case, *ibid.*, the cost-plus exception would not apply.

In the meantime, the en banc Seventh Circuit had reached a contrary conclusion in *Illinois ex rel. Hartigan* v. *Panhandle Eastern Pipe Line Co.*, 852 F.2d 891 (*reprinted at* Pet. App. A43-A65), cert. denied, 109 S.Ct. 543 (1988). The Tenth Circuit, however, expressly declined "to apply the law as enunciated in *Panhandle Eastern.*" Pet. App. A13.

SUMMARY OF ARGUMENT

In *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), and *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), this Court held that an injured

[2] The court noted that this Court had not said that a pre-existing cost-plus contract for a fixed quantity "would constitute an exception but rather that it 'might be.'" Pet. App. A8.

direct purchaser—and not a subsequent indirect purchaser—is entitled to recover the full measure of antitrust damages. That rule applies even if the injured direct purchaser passed on the full amount of the illegal overcharge to the indirect purchaser.

A. The Court did recognize that an exception might exist where the direct purchaser suffered no antitrust injury whatsoever, and that fact was easily proven. Such an exception might apply when the direct purchaser has a pre-existing cost-plus contract with a customer (the indirect purchaser) for a fixed quantity. But any such exception has no application here. The residential utility customers (on whose behalf the States sued as *parens patriae*) were under no obligation to maintain purchases of a fixed quantity of natural gas at the allegedly inflated price. Hence, respondent presumably lost profits from reduction in demand for natural gas as a result of the higher price.

Decisions of this Court and lower federal courts since 1906 have held that an injured direct purchaser is entitled to recover an overcharge (so that, conversely, an indirect purchaser is entitled to no recovery) as long as the direct purchaser suffered injury under Section 4. That rule applied regardless of whether the direct purchaser passed on the overcharge to its customer, the indirect purchaser. This rule greatly simplified antitrust litigation and facilitated enforcement of the antitrust laws. *Hanover Shoe* simply extended the rule by barring complicated and usually futile attempts to prove that the direct purchaser was not injured, thus further simplifying litigation and facilitating enforcement.

B. No exception to the rule barring indirect purchaser suits should be created for cases in which 100% of an overcharge is passed through to an indirect purchaser. Considerations of *stare decisis*, administrability, and antitrust policy impose a heavy burden on those who urge creation of an exception to the rule of *Hanover Shoe* and *Illinois Brick*. That burden cannot be satisfied here. A "100% pass-through" exception would be difficult to

prove, the addition of new parties would complicate litigation, and such an exception would dilute incentives to sue by jeopardizing compensation for those directly injured by an illegal overcharge. Limiting a "100%" pass-through" exception to regulated industries, or to circumstances in which the pass on is presumed to occur as a matter of law, does not sufficiently increase the benefits or reduce the costs of the exception.

ARGUMENT

A DIRECT PURCHASER THAT SUFFERS INJURY (AND ONLY THE DIRECT PURCHASER) IS ENTITLED TO RECOVER THE FULL MEASURE OF ANTITRUST DAMAGES EVEN IF IT PASSED ON AN OVERCHARGE TO ITS CUSTOMERS

The *Hanover Shoe/Illinois Brick* rule holds that an indirect purchaser cannot recover antitrust damages for an illegal overcharge passed through to it by an injured direct purchaser. Instead, only the direct purchaser can recover. Any possible exception to that rule—for preexisting cost-plus contracts for a fixed quantity—does not apply in this case, because that exception is limited to the situation where it is simple to show that the direct purchaser was not injured *at all* by the overcharge. Proof of even a 100% pass on here would not establish lack of injury to the direct purchaser because, as petitioners concede, Br. 14-15, the direct purchasers (the utilities) may nevertheless have lost profits (by virtue of lost sales) and thus been injured. In addition, no applicable new exception can be justified consistent with *Illinois Brick*.

A. The Possible "Cost-Plus" Exception Would Only Permit An Indirect Purchaser To Sue When It Is Easy To Prove That The Direct Purchaser Was Not Injured At All By The Overcharge

At least since the first decade of this century, the antitrust laws have provided that a direct purchaser who pays a price unlawfully elevated by an antitrust violator

and is injured in his business or property is entitled to recover as damages the difference between the price paid and the price which would have prevailed but for the violation. The "cost-plus exception" hinted at by this Court in *Hanover Shoe* and *Illinois Brick* is not an exception to this rule at all. Rather, the "exception" would, in certain circumstances, simply permit proof that a direct purchaser has not in fact been injured. Here, there is no claim that the direct purchaser was not injured.

1. Hanover Shoe *And* Illinois Brick *Do Not Permit Indirect Purchasers To Sue For Antitrust Injury Damages Where The Direct Purchaser Suffered Injury*

Hanover Shoe rejected the pass-on defense to a suit by a direct purchaser except (perhaps) where it is "easy to prove" that the direct purchaser "has not been damaged" in his business or property under the antitrust laws. 392 U.S. at 494. *Illinois Brick* held that if a pass-on theory may not be used defensively by a defendant against a direct purchaser, it may not be used offensively by an indirect purchaser to sue the defendant. 431 U.S. at 728. Because petitioners' offer to prove that respondent passed through 100% of any overcharge to indirect purchasers fails to establish that respondent has "not been damaged" as required by *Hanover Shoe* (in the defensive context), and because defensive and offensive uses of the pass-on theory are to be treated equally according to *Illinois Brick*, petitioners' attempt to use the pass-on theory offensively here is foreclosed by *Hanover Shoe* and *Illinois Brick*.

a. In *Hanover Shoe*, plaintiff Hanover—a shoe manufacturer—alleged that defendant United—a manufacturer of shoe machinery—unlawfully refused to sell its machinery and only leased it, so that the cost to Hanover was higher than it otherwise would have been. Hanover sought to recover the overcharge as damages. For its part, United contended that Hanover was not injured and was therefore not entitled to recover under Section 4

of the Clayton Act, because any excess cost of leasing as opposed to purchasing "was not absorbed by Hanover but was transferred to its customers." Pet. Br. at 62, *United Shoe Machinery Corp.* v. *Hanover Shoe, Inc.*, No. 463 (1967 Term) (consolidated with *Hanover Shoe*).

This Court squarely rejected United's contention. The *Hanover Shoe* Court held that "when a buyer shows that the price paid by him for materials purchased for use in his business is illegally high and also shows the amount of the overcharge, he has made out a prima facie case of injury and damage within the meaning of § 4." 392 U.S. at 489. Moreover, "the buyer is equally entitled to damages if he raises the price for his own product," because by charging an unlawfully high price, the seller "takes from the buyer more than the law allows" and "[a]t whatever price the buyer sells, * * * his profits would be greater were his costs lower." *Ibid.* The Court thus rejected the defense to a suit by a direct purchaser that the full overcharge was passed through to its customers, the indirect purchasers. *Id.* at 492-494.

What is more, the Court refused as a general matter to entertain offers of proof that the direct purchaser suffered "no loss" at all from the overcharge. United had proposed to prove that 100% of the overcharge was passed through to indirect purchasers *and* that Hanover had suffered no lost profits from a "decline in sales" because "the demand for [its] products [w]as so inelastic" that a price increase in the full amount of the overcharge would not cause "a consequent decline in sales." 392 U.S. at 492. But the Court concluded that "in the real economic world rather than an economist's hypothetical model," *id.* at 493, the task "would normally prove insurmountable" because numerous factors influence pricing policies, the effect on sales of a change in price is difficult to determine, and the behavior of unit costs given a change in sales volume cannot reliably be measured, *id.* at 492-493. Rather than permit defendants needlessly to complicate antitrust litigation by attempting to prove that the plaintiff had suffered no injury, the Court generally barred the pass-on defense.[3]

The Court did, however, suggest that in exceptional circumstances the pass-on defense "might" be permitted and the overcharged direct purchaser's prima facie claim of injury rebutted "when an overcharged buyer has a pre-existing 'cost-plus' contract, thus making it easy to prove that he has not been damaged." 392 U.S. at 494. Because the Court had earlier in its opinion recognized that an overcharged plaintiff would be injured despite a complete pass on of the overcharge if its sales declined as a result of charging higher prices, *id.* at 493, a fixed quantity qualification was implicit in its references to a "'cost-plus' contract," since only then would it to be "easy to prove" that the plaintiff had not been injured.[4] The Court made this limitation explicit in *Illinois Brick*,[5] noting that with a cost-plus contract, "the purchaser is insulated from any decrease in its sales as a result of attempting to pass on the overcharge, because its customer is committed to buying a fixed quantity regardless of price." 431 U.S. at 736.[6]

[3] The Court briefly discussed additional policy considerations supporting its holding, 392 U.S. at 494, which we address below.

[4] Recognition of this possible exception is not compelled by the reasoning of *Hanover Shoe*. The cases on which the Court relied, see Point A.2, *infra*, appear to hold that payment of the overcharge as such is injury. Moreover, a direct purchaser may be damaged despite the existence of a cost-plus, fixed quantity contract—for example, if there is imperfect compliance with the contract.

[5] In *Illinois Brick* the Court also suggested another possible exception: "where the direct purchaser is owned or controlled by its customer." 431 U.S. at 736 n.16. In such cases, the direct and indirect purchasers are in reality but a single entity, and no reason in law or antitrust policy suggests that one rather than the other should be allowed to recover damages for the injury. Cf. *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 771-774 (1984).

[6] *Hanover Shoe* addressed the pass-on defense. *Illinois Brick* held that "whatever rule is to be adopted regarding pass-on in antitrust damage actions, it must apply equally to plaintiffs and defendants,"

b. The Tenth Circuit correctly interpreted the possible " 'cost-plus' contract" exception as "requiring a pre-existing cost-plus contract for a fixed quantity," Pet. App. A8, which is not present in this case. And it correctly perceived that, in the absence of a contract for a fixed quantity, there remained "the issue of decreased residential demand caused by the higher price," Pet. App. A12-A13, even if, as alleged, the utilities passed on the entire overcharge to their customers. Thus, a perfect pass on alone would not establish, as defendants had asserted, that the "plaintiffs had not been injured in their business or property," Pet. App. A4—the plaintiff utilities may well have lost profits because of declining volume resulting from a higher price. The indirect purchaser rule, therefore, provides that the utilities, as direct purchasers, may sue for the entire amount of the overcharge, and concomitantly that the indirect purchasers may not sue.

The Seventh Circuit in *Panhandle Eastern* reached a contrary conclusion only by overlooking the predicate of the cost-plus exception suggested in *Hanover Shoe* and *Illinois Brick*: that the direct purchaser not be injured at all as a result of an overcharge. Indeed, the Seventh Circuit conceded that the direct purchaser in *Panhandle* would have lost sales to residential customers as a result of the higher prices; in consequence, the direct purchaser would have suffered injury and could sue for damages. Pet. App. A54-A55.[7] The Seventh Circuit apparently believed that a cost-plus exception was justified where there is no need to apportion the incidence of an overcharge between a direct purchaser and indirect purchasers—*i.e.*, to determine the proportion of the overcharge borne by each class of purchasers. Pet. App. A50-A51, A55, A58. It concluded that other arrangements that may ensure a perfect pass on of the overcharge serve the same function as a pre-existing cost-plus contract for a fixed quantity, and therefore fall within the scope of the exception.[8]

Whatever the relevance of ease of apportionment to the decision whether to create other exceptions to the indirect purchaser rule, it is not the reason this Court articulated as a possible justification for a cost-plus exception. Indeed, the Court's opinion in *Hanover Shoe* did not mention the problem of apportioning the amount of the overcharge paid. And in *Illinois Brick*, this Court considered the apportionment problem in the context of whether it should "cut back or abandon the *Hanover Shoe* rule." 431 U.S. at 736; see *id.* at 740-742.[9] The Court suggested the possible cost-plus exception because a particular kind of contract made it easy to prove that the direct purchaser had not been damaged at all. The *Hanover Shoe* Court never even contemplated permitting both direct and indirect purchasers to sue, with a resulting need to apportion damages or restrict an injured direct

431 U.S. at 728, and declined to overrule or limit the rule of *Hanover Shoe*.

[7] The contention of amici Forty-Six States that "[a] regulatory scheme that provides for automatic pass-through of fuel price increases operates identically to a fixed-quantity cost-plus contract," Forty-Six States Amici Br. 14, is incorrect: such a contract—unlike the regulatory scheme—prevents loss of sales that would otherwise follow the increase in price. Amici tacitly recognize this difference when they present an alternative argument in the event that "residential customers reduce consumption in response to higher rates." *Id.* at 15. Similarly, petitioners expressly recognize "[t]he fact that the utilities may have lost sales." Pet. Br. 14.

[8] According to the Seventh Circuit, other arrangements serving this function include, at a minimum, not just regulatory provisions such as those at issue here, but also requirements contracts with cost-plus provisions. Pet. App. A57, A59.

[9] The Court's two brief discussions of the cost-plus exception in *Illinois Brick*, 431 U.S. at 724 n.2, 736, occurred prior to its introduction of apportionment concerns, see *id.* at 737. Illinois had contended that "[t]he masonry and general contractors are nothing more than conduits between defendants and plaintiffs. The contractors absorb none of the illegal overcharges, but recover it (and more) from the State of Illinois and its public agencies." Resp. Br. at 21, *Illinois Brick Co.* v. *Illinois*, *supra*. If that were true, there would have been no need to apportion the overcharge in that case even if Illinois had been permitted to sue for the overcharge.

purchaser to recovering his lost profits from diminished sales volume.

Thus, the Seventh Circuit's conclusion that the indirect purchaser rule, as formulated by this Court, can be interpreted to bar recovery of the overcharge by an injured direct purchaser is simply wrong. Whether or not there is an exception to the indirect purchaser rule for pre-existing cost-plus contracts for a fixed quantity, the Tenth Circuit correctly held that such an exception, as this Court has articulated its scope,[10] was not applicable here.

2. *The Rule That A Direct Purchaser May Recover The Entire Overcharge If The Overcharge Injured It (And Conversely, That An Indirect Purchaser May Not Recover In That Situation) Is Of Long Standing And Represents Sound Antitrust Policy*

Hanover Shoe and *Illinois Brick* were not *sui generis*. To the contrary, they represented the culmination of a line of decisions by the Supreme Court and lower federal courts which had repeatedly held that injured direct purchasers were entitled to recover the entire overcharge. *Hanover Shoe*, 392 U.S. at 489-492 & n.7. The decisions antedating *Hanover Shoe* and *Illinois Brick* confirm that the rationale underlying the cost-plus/fixed-quantity contract exception is that such a contract made it "easy to prove" that the direct purchaser "has not been damaged" at all by the unlawful overcharge. *Hanover Shoe*, 392 U.S. at 494. Accordingly, the pass-on defense succeeded in those earlier cases only when the direct purchaser suffered no injury or failed to prove injury.

[10] The Court's brief mention of the cost-plus exception in *California v. Arc America Corp.*, 109 S.Ct. 1661, 1663 n.2, 1666 n.6 (1989), does not indicate any change in the underlying rationale or scope of that exception. The Court specifically referred to footnote 12 of *Illinois Brick*, which in turn quotes the portion of *Hanover Shoe* making clear that the cost-plus exception has to do with proof that the direct purchaser " 'has not been damaged,' " 431 U.S. at 732 n.12 (quoting 392 U.S. at 494).

The rejection of the pass-on theory in cases presaging *Hanover Shoe* and *Illinois Brick* accords with considerations of sound antitrust policy. Those decisions allowed injured direct purchasers (and, assuming mutuality of offensive and defensive use of the pass-on theory, *only* direct purchasers) to elect to recover illegal overcharges rather than having to prove lost profits, which would have been necessary if the pass-on defense were allowed.[11] Given the opportunity to recover the overcharge, direct purchasers could be expected to (and did in fact) seek that measure of damages, because the overcharge invariably equalled or exceeded any lost profits,[12] and because such damages were relatively simple to prove.[13] By allowing direct purchasers to recover the entire overcharge, the decisions anticipating *Hanover Shoe* and *Illinois Brick* provided direct purchasers with ample incentive to sue, thereby encouraging enforcement of the antitrust laws and enhancing their deterrent effect.

a. This Court first stated the fundamental principle that injured direct purchasers are entitled to recover the overcharge in 1906, in *Chattanooga Foundry & Pipe*

[11] This Court recognizes the distinction between overcharge and lost profits measures of damages, and suggested in *Hanover Shoe* that where the plaintiff could not prove an overcharge, "establishing damages might require a showing of loss of profits to the buyer." 392 U.S. at 494.

[12] If the direct purchaser absorbs the entire overcharge, its lost profits equal the amount of the overcharge. If instead the direct purchaser chooses to pass on some or all of the overcharge, it presumably does so because that action leads to a smaller decrease in profits. Thus, the amount of the overcharge should always equal or exceed lost profits.

[13] The aggregate overcharge is equal to the overcharge per unit multiplied by the number of units bought. The only difficult quantity in the calculation is the per unit overcharge, but that computation must be made to quantify lost profits as well: a prerequisite to determining reduction in quantity demanded from higher prices is an estimate of how much higher that price was. See note 14, *infra* (difficulty of proving lost profits measure of damages).

Works v. *City of Atlanta*, 203 U.S. 390 (1906). The City of Atlanta, which operated "a system of waterworks, and furnished water to consumers, charging for same precisely as would a private corporation engaged in like business," *City of Atlanta* v. *Chattanooga Foundry & Pipeworks*, 127 F. 23, 25 (6th Cir. 1903), aff'd, 203 U.S. 390 (1906), bought pipe for the waterworks at prices inflated by a price-fixing conspiracy and then sued "to recover back, as damages, the sum of money unlawfully demanded and paid," *City of Atlanta* v. *Chattanooga Foundry & Pipe Co.*, 101 F. 900, 907 (E.D. Tenn. 1900)—in other words, the amount of the overcharge.

Although Atlanta presumably recouped some or all of the overcharge it paid by increasing what it charged consumers, the appropriate measure of damages appears not to have been questioned at trial or on appeal. Nevertheless, on appeal of a verdict awarding Atlanta "the difference between the price paid and the market or fair price that the city would have had to pay under natural conditions had the combination been out of the way," 203 U.S. at 396, both the court of appeals and this Court had occasion to discuss injury and damages. The court of appeals noted that if the effect of a price-fixing conspiracy were to restrain interstate commerce "by reason of its tendency to affect the volume of such trade, then the effect upon the business of one who has paid the enhanced price * * * must be to correspondingly affect the volume or profit of that business." Since the excessive price results from the unlawful combination, the buyer "is entitled to recover the damages thus sustained," for the statute provides "compensatory relief to such persons as shall sustain an injury in some * * * business whose volume or profit has been diminished." 127 F. at 27. Justice Holmes for this Court said that Atlanta "was injured in its property, at least, if not in its business of furnishing water, by being led to pay more than the worth of the pipe. A person whose property is diminished by payment of money wrongfully induced is injured in his property." 203 U.S. at 396.

In 1918, Justice Holmes further explained the reasons for permitting the victim of an overcharge to recover the amount of the overcharge without inquiry into whether it had been passed on to the victim's customers. *Southern Pac. Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (1918). In *Darnell-Taenzer*, the Interstate Commerce Commission had found that the defendant railroad had charged an excessive rate and ordered reparation of the excess. When the railroad did not pay, a company which had paid the overcharge to the railroad sued to recover it. The railroad, in perhaps the first reported use of the so-called "pass-on defense," claimed that the plaintiff was not entitled to recover because it had passed on the overcharge to its customers. Rejecting that defense, Justice Holmes explained:

> The general tendency of the law, in regard to damages at least, is not to go beyond the first step. As it does not attribute remote consequences to a defendant so it holds him liable if proximately the plaintiff has suffered a loss. The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events.

Id. at 533-534. Moreover, Justice Holmes pointed to another reason not to inquire into the ultimate economic effect of the overcharge on the plaintiff, one which assumed greater significance in *Hanover Shoe* and *Illinois Brick*—"the endlessness and futility of the effort to follow every transaction to its ultimate result." *Id.* at 534.

b. Because the amount of lost profits attributable to an overcharge can be difficult to prove [14] and is invariably no more than the overcharge itself, victims of overcharges

[14] See, *e.g.*, *Central Coal & Coke Co.* v. *Hartman*, 111 F. 96 (8th Cir. 1901) (no recovery because lost profits held too speculative). See generally Harrison, *The Lost Profits Measure of Damages in Price Enhancement Cases*, 64 Minn. L. Rev. 751, 754-755 (1980) (difficulty of proving lost profits probably retarded development of private antitrust action).

have generally sued for the amount of the overcharge rather than for their lost profits, and courts have expressly approved that election. Thus, in *Straus* v. *Victor Talking Mach. Co.*, 297 F. 791 (2d Cir. 1924), plaintiffs did not "sue[] for damages due to loss of profits. Their position is that they were entitled to buy goods in a free market," *id.* at 802-803, but instead were compelled to buy phonograph records at a higher price for resale to their customers, and they sued for the overcharge. The court held that plaintiffs "were not forced to sue for damages for loss of profits, and thus run the risk of no recovery" because of difficulty of proof, *id.* at 803, and, citing, *inter alia*, *Chattanooga Foundry* and *Darnell-Taenzer*, affirmed the award of the overcharge as damages.[15]

Despite clear precedent supporting an injured direct purchaser's recovery of the full amount of an overcharge, defendants continued to offer the pass-on defense, with occasional success. But where the defense was successful, it was because the court concluded that the plaintiff had not been injured or had failed to prove injury. The lower courts, despite the fact of overcharge, addressed whether the direct purchaser suffered injury. For example, in the "oil jobber" cases, brought in the wake of the government's successful prosecution for price fixing in the oil industry, *United States* v. *Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150 (1940), oil jobbers sought, without success, recovery for damages they allegedly suffered as a result of the price fixing conspiracy. After some jobbers' claims

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[15] The court thus rejected defendant's argument that evidence tending to show that a claimed loss was only a temporary loss "which the plaintiff in the course of his business has actually recoupped [sic] or could reasonably have recouped, is obviously evidence that is directly relevant to the issue whether the plaintiff has actually and ultimately been 'injured in his business or property.'" Brief on Behalf of Defendant Victor Talking Mach. Co. at 140-141 as quoted in *Atlantic City Elec. Co.* v. *General Elec. Co.*, 226 F. Supp. 59, 62 n.11 (S.D.N.Y. 1964).

for damages on decreased margins failed when no such decline could be shown, see, *e.g.*, *Twin Ports Oil Co.* v. *Pure Oil Co.*, 119 F.2d 747, 750 (8th Cir.), 314 U.S. 644 (1941),[16] other jobber plaintiffs sought instead to recover the amount of the overcharge on the gasoline they bought. These latter jobbers contended that they were entitled "to recover without proof that they suffered any pecuniary loss in their business or property," and "even though their margins or profits on the gasoline were not lessened by reason of the conspiracy." *Clark Oil Co.* v. *Phillips Petroleum Co.*, 56 F. Supp. 569, 570-571 (D. Minn. 1944), aff'd, 148 F.2d 580 (8th Cir.), cert. denied, 326 U.S. 734 (1945). The district court in *Clark Oil* noted that plaintiffs had "allege[d] and claim[ed] no injury to their business or property," 56 F. Supp. at 575, and granted summary judgment for defendants; the court of appeals affirmed.[17]

cert Denied

Pass-on defenses were rejected in a series of cases arising out of a price fixing conspiracy in the electrical equipment industry, largely on the authority of *Chattanooga* and *Darnell-Taenzer*. See, *e.g.*, *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg.*, 335 F.2d 203 (7th

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[16] The court in *Twin Ports* also distinguished such cases as *Darnell-Taenzer* on various grounds, but primarily to establish that plaintiff was required to show pecuniary injury. 119 F.2d at 750-751. Its holding rested on plaintiffs' "failure to show * * * damages * * * as a result of the illegal combination." *Id.* at 751. Similarly, in *Northwestern Oil Co.* v. *Socony-Vacuum Oil Co.*, 138 F.2d 967, 971 (7th Cir.), cert. denied 321 U.S. 792 (1943), the court distinguished the *Darnell-Taenzer* line of cases, held that a showing of pecuniary loss was required, and denied recovery on the ground that plaintiff had "wholly failed to prove any loss to its property or business."

[17] See also *Wolfe* v. *National Lead Co.*, 225 F.2d 427, 433-434 (9th Cir.), cert. denied, 350 U.S. 915 (1955); *Miller Motors* v. *Ford Motor Co.*, 252 F.2d 441, 448 (4th Cir. 1958). In *Wolfe*, the court concluded there was no evidence that prices were fixed at higher than competitive levels or that plaintiffs had been damaged by paying higher prices, so that there was no proof of injury. In *Miller*, the court found both that the charge had been passed on and that any decline in volume was conjectural.

Cir. 1964). Judge Feinberg's opinion in *Atlantic City Elec. Co. v. General Elec. Co.*, 226 F. Supp. 59 (S.D.N.Y. 1964), is particularly enlightening. In a suit brought by an electric utility to recover the overcharge on the purchase of electrical equipment at prices allegedly inflated by price fixing, the court refused to require discovery into plaintiffs' rate bases and rates of return on the ground that evidence that plaintiffs had passed on the increased costs on to their customers was irrelevant. Judge Feinberg began by noting that a party suing for antitrust damages had traditionally been permitted to recover loss of profits, increased costs of business transacted, or decrease in value of investment; that these categories of injury were not necessarily mutually exclusive; and that recovery could be had for all three, given appropriate evidence. *Id.* at 61. He then observed that "as a practical matter, recognition of the passing-on doctrine is tantamount to a repudiation of the 'increased costs' measure of damages and a limitation of the extent of recovery primarily to lost profits." [18] *Id.* at 61-62. Judge Feinberg found support for the distinction between lost profits and the amount of the overcharge, and for an antitrust plaintiff's right to recover the amount of the overcharge, in *Straus*, *Chattanooga*, *Darnell-Taenzer*, and other cases. *Id.* at 62-67.[19]

[18] If the overcharge paid is reduced by the amount of the overcharge passed on, the result is a measure of lost profits on business actually transacted, assuming other factors affecting profits are unchanged.

[19] Judge Feinberg also sought to distinguish the oil jobber cases on various grounds. For example, he noted that the oil jobbers were able to recover their increased costs quickly, while electric utilities could not and would be "deprived for a long period of time of capital which they could have used for other purposes." 226 F. Supp. at 69. This suggests that, assuming complete pass on of the overcharge and ignoring lost profits from declining volume, the oil jobbers in fact had not been injured, while the electric utility was injured.

Ultimately, however, Judge Feinberg concluded that if the oil jobber cases could not be distinguished, they were "inconsistent with what appears to be more compelling authority." 226 F. Supp. at 70. Finally, Judge Feinberg concluded that recognition of a pass-on defense was not required as a matter of public policy. *Id.* at 70-71.

The pass-on theory has barred recovery of the overcharge by a direct purchaser only when he has suffered no injury to his business or property, thus confirming that the possible cost-plus exception to this Court's general rejection of the pass-on theory in *Hanover Shoe* and *Illinois Brick* extends only to the case where it is "easy to prove" that the direct purchaser "has not been damaged." *Hanover Shoe*, 392 U.S. at 494.[20] History equally demonstrates the wisdom of allowing direct purchasers to sue for the overcharge rather than attempting to establish the far more difficult measure of damages from lost profits. By permitting direct purchasers to recover the overcharge, disallowance of pass-on theories has encouraged enforcement of the antitrust laws and enhanced their deterrent effect.

B. No Exception To The *Hanover Shoe/Illinois Brick* Rule Barring Recovery By Indirect Purchasers Should Be Created For The Circumstances Of This Case

The Court has not previously suggested the existence of an exception to the indirect purchaser rule that would apply in this case, where the direct purchaser's injury is undisputed. We nonetheless consider whether antitrust policy suggests that the rule of *Hanover Shoe* and *Illinois Brick* be cut back to accommodate recovery of an overcharge by indirect purchasers where regulation (or pre-

[20] The varying approaches of the lower courts to the pass-on theory prior to *Hanover Shoe* turned on their treatment of evidence of the direct purchaser's injury. *Hanover Shoe* resolved the question dividing the lower courts by presuming injury from the overcharge and permitting the presumption to be rebutted, if at all, only by a simple evidentiary showing that the direct purchaser had not been injured at all.

existing contract)[21] provides for complete pass on of the overcharge, even though neither contract nor regulation insulates the direct purchaser from injury.

Illinois Brick, in which the Court refused to cut back on the *Hanover Shoe* rule, provides the framework for evaluation of any proposed exception to that rule. First, *Illinois Brick* indicates that proponents of an exception must shoulder a heavy burden of justification, because "considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation." 431 U.S. at 736. The burden of precedent would seem even heavier since *Illinois Brick*, for in that case the Court rejected "attempts to carve out exceptions to the *Hanover Shoe* rule for particular types of markets." 431 U.S. at 744. That is precisely what would have to be done here. Second, any exception should be limited to narrowly defined circumstances and specifically justified by policy considerations clearly distinguishing those circumstances, so that the exception does not "substantially erode the *Hanover Shoe* rule without justification." *Ibid.* Third, any potential exception should be evaluated in light of the antitrust policy objectives of deterring antitrust violations and compensating victims, and the deterrence objective should be considered in light of incentives to sue and limiting the complexity of litigation.[22]

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[21] Although petitioners address only regulatory pass through, they present no basis for distinguishing regulatory pass through from pass through pursuant to contracts the Seventh Circuit concluded had similar effects and should be treated similarly. See note 8, *supra*.

[22] The policy objective of avoiding multiple liability also figures prominently in *Illinois Brick*. 431 U.S. at 730-731. However, the Court in *Illinois Brick* saw this objective as relevant to whether offensive and defensive use of pass-on theories should be treated symmetrically. The Court held that they should be, and that holding is not at issue here. Consequently, multiple liability is merely a "residual possibility," 431 U.S. at 737 n.18, which, although it "justifies bringing potential and actual claimants together in one action if possible," *ibid.*, has little bearing on the policy choices this case presents.

1. *A "Regulatory/Contractual 100% Pass-Through" Exception Should Not Be Created*

In our view, an exception to the indirect purchaser rule which would apply when the injured direct purchaser *in fact* passed on 100% of the overcharge, pursuant to contract or regulatory requirement, cannot be justified. Any attempt to prove that there had in fact been a perfect pass through of the overcharge would "entail the very problems that the *Hanover Shoe* rule was meant to avoid." *Illinois Brick*, 431 U.S. at 745. Despite a contract or regulatory requirement providing for pass through, proving a perfect pass through can be difficult, as recognized by both the Tenth Circuit in this case[23] and the Seventh Circuit in *Panhandle Eastern*.[24]

Moreover, the complexity of litigation would be increased by an increase in the number of parties involved. Direct purchasers who passed on the entire overcharge would presumably still seek to recover their lost profits attributable to declining volume, as the utilities do

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[23] "Any allocation of illegal overcharges to the residential consumers may require tracing the sale from the wellhead through each level of distribution in order to establish the amount of illegal gas costs actually paid by the consumers in each state, probably resulting in exactly that which the Supreme Court prohibited, i.e., adding new dimensions of complexity to antitrust suits." Pet. App. A12.

[24] "[W]e can never be absolutely certain that regulation has resulted in a 100 percent pass through; for all we know, [the direct purchaser] would have sought a rate increase but for the gas overcharge, and by forbearing to do so in effect absorbed part of the overcharge." Pet. App. A59. The Seventh Circuit found doubts on this score "too small to warrant" barring suit by indirect purchasers, *ibid.*, although this Court had pointed to just such doubts in *Hanover Shoe*. See 392 U.S. at 493 & n.9 ("the nearly insuperable difficulty of demonstrating that the particular plaintiff [a direct purchaser] could not or would not have raised his prices absent the overcharge").

here,[25] and they would also presumably seek to prove—if appropriate—that they did not pass on all of the overcharge. Indirect purchasers, generally more numerous than direct purchasers, may participate in the proceedings in various ways. If States choose to bring *parens patriae* actions, as here, natural persons may be represented by one or more state attorneys general, but they may also sue by class action or individually. Persons other than natural persons may not be represented by state attorneys general acting *parens patriae* and pre-

[25] We see no basis for preventing recovery of these lost profits by direct purchasers who are not permitted to recover the amount of the overcharge. Neither petitioners nor amici suggest any such limitation, the Tenth and Seventh Circuits appear to have assumed direct purchasers would still be able to sue for those lost profits, and permitting recovery by direct purchasers of their lost profits would seem consistent with this Court's analysis in *Hanover Shoe* of proof of damages where the purchaser cannot show a differential between the lawful price and the price unlawfully charged, 392 U.S. at 494. As Judge Feinberg perceived, permitting a pass-on defense amounts to requiring a direct purchaser to sue for lost profits, *Atlantic City Elec.*, 226 F. Supp. at 61-62, and some other principle would be required to deprive the direct purchaser of even lost profits damages. Proving the extent to which volume declined as a result of a price increase is likely to entail analysis of the same elasticities that troubled this Court in *Illinois Brick*. 431 U.S. at 742 ("a serious problem of measuring the relevant elasticities—the percentage change in the quantities of the passer's product demanded and supplied in response to a one percent change in price"). The difficulty of proving lost profits is, of course, one of the reasons for the indirect purchaser rule in the first place. See Point A.2, *supra*. The difficulty is less likely to arise if only the direct purchaser may recover the amount of the overcharge. Even if the direct purchaser is legally entitled to recover both the overcharge and lost profits from declining volume (assuming any overlap is eliminated), the difficulty of proving those lost profits appears generally to lead plaintiffs to conclude the game is not worth the candle, where the trebled amount of the overcharge is more readily available.

sumably would seek to recover either individually or through class actions.[26]

Proliferation of parties, and in particular of indirect purchaser parties, runs precisely the risks of insufficient incentive to sue and inadequate compensation of injured purchasers to which this Court referred in *Illinois Brick*, 431 U.S. at 745-747.[27] And if even the possi-

[26] In *Panhandle Eastern*, the court concluded that indirect purchasers other than residential consumers could not maintain damage actions, because the overcharge had not been passed through perfectly to them; the utility therefore was permitted to sue for the overcharge with respect to those consumers. In this case, we are aware of no basis for distinguishing between residential consumers and other consumers, or between natural person consumers and other consumers, with respect to passing on. We note that only the utilities in this case, as direct purchasers, have sued to recover the overcharge passed on to those customers who are not natural persons. It appears, therefore, that if the right to sue for the overcharge in this case belongs to indirect purchasers, the good news is that this litigation will not be complicated by the presence of *these* customers—but the bad news is that the defendants will escape liability for the overcharge passed on to customers who are not natural persons.

[27] We do not question the assertions of amici Forty-Six States concerning the power and efficacy of the *parens patriae* weapon or the capabilities of state attorneys general and their staffs. Forty-Six States Amici Br. 18-22. We disagree, however, with the argument advanced by petitioners, Br. 23-27, and amici National Conference of State Legislatures et al., Br. 5-21, that Section 4C of the Clayton Act, 15 U.S.C. 15c, authorizes state attorneys general to bring *parens patriae* actions on behalf of indirect purchasers who are natural persons. That argument is foreclosed by *Illinois Brick*.

In *Illinois Brick*, the United States as amicus curiae contended that Section 4 of the Clayton Act should be construed to allow indirect purchasers to recover illegal overcharges passed through to them by direct purchasers. The United States reasoned that (1) Section 4C incorporated the same definition of injury as Section 4; (2) Section 4C allows indirect purchasers to recover overcharges passed through by direct purchasers (as shown in the legislative history of Section 4C and the policy considerations underlying that

bility of recovery by indirect purchasers depends on proving perfect pass on, "[t]his additional uncertainty would

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provision); therefore (3) Section 4 should likewise be construed to authorize indirect purchaser suits. U.S. Amicus Br. at 14-15 & n.12. See 431 U.S. at 756-758 (Brennan, J., dissenting).

The Court agreed that Section 4C and Section 4 share the same definition of injury, but disagreed that Section 4 authorized indirect purchaser suits. 431 U.S. at 731 n.14. The Court accordingly rejected (albeit implicitly) the United States' submission that Section 4C should be construed to authorize indirect purchaser suits. 431 U.S. at 733-734 n.14. Although petitioners and amici concede, as they must, that Section 4 does not authorize indirect purchaser suits, Pet. Br. 23; National Conf. of State Legislatures et al., Amici Br. 6-7 & n.4, 17, their insistence that Section 4C nevertheless does authorize such suits simply disregards the Court's holding that Section 4C incorporated the definition of injury in Section 4. "Congress made clear, however, that [Section 4C] * * * simply created a new procedural device—*parens patriae* actions by States on behalf of their citizens—to enforce existing rights of recovery under § 4. The House Report * * * stated that the *parens patriae* provision 'creates no new substantive liability'; the relevant language of the newly enacted § 4C(a) of the Clayton Act tracks that of existing § 4, showing that it was intended only as 'an alternative means . . . for the vindication of existing substantive claims.' H.R. Rep. No. 94-99, *supra*, at 9 [(1975)]. 'The establishment of an alternative remedy does not increase any defendant's liability.' *Ibid.* * * * [Section 4C] did not create a right of recovery for consumers where one did not already exist [under Section 4]." 431 U.S. at 734 n.14.

In any event, the Court need not construe Section 4C in this case because the argument was neither pressed nor passed on by the courts below. Tellingly, petitioners do not contend that they pressed their view of Section 4C below, and amici's contention that they did ignores the court of appeals' correct observation that "[t]he parties have not argued that this law [Section 4C] eliminates the basic rule that only a direct purchaser may sue." Pet. App. A7 n.1. Amici quote the succeeding sentence for the proposition that the court of appeals decided the issue, National Conf. of State Legislatures, et al. Amici Br. 5 n.2, but the court of appeals' clearly "assume[d] that [Section 4C] comes into play when the individual consumers are the direct purchasers," *id.* at 6 n.3 (quoting Pet. App. A7 n.1), because neither petitioners nor amici suggested any contrary interpretation.

further reduce the incentive to sue" and "could seriously impair" the efficacy of treble damage actions. *Id.* at 745. The prospect of protracted litigation over which party may sue to recover the overcharge would make all parties less inclined to bring suit.

The special circumstances of regulation do not alter the analysis of incentives or compensation so as to justify permitting the attempt to prove a perfect pass through here. In response to the concern about increasing the number of parties to antitrust litigation, the Seventh Circuit hypothesized that "[t]he public utility commission may force the utility to pass on to the consumers any and all damages that the utility recovers, and if it does utilities will have no incentive to sue because they will have nothing to gain from suit." *Illinois ex rel. Hartigan* v. *Panhandle Eastern Pipe Line Co.*, 852 F.2d at 895. But there are at least two problems with this hypothesis. First, it seems unlikely that a public utility commission would require dollar for dollar pass through to consumers of three times the amount of the overcharge the utility passed on, or dollar for dollar pass through of three times the amount of the utility's lost profits on volumes it did not sell to consumers (assuming the utility could recover that as well). Thus the utility would most likely have the not insignificant incentive of recovering twice the overcharge, and possibly the additional incentive of recovering three times its lost profits. Second, a public utility commission capable of requiring a utility to pass through its entire antitrust recovery to its customers would also seem capable of motivating a regulated utility to bring suit.[28]

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[28] A public utility commission might treat costs attributable to a suspected antitrust violation as costs imprudently incurred if the utility does not bring suit.

As to this case, the district court observed that "any recovery by the utilities * * * will be passed on in substantial part to the consumers." Pet. App. A36. We also note that the *parens patriae* statute does not require that amounts recovered be distributed to those

In sum, an exception to the indirect purchaser rule permitting suit by indirect purchasers who can prove complete pass through of an overcharge even though the direct purchaser is injured risks introducing nearly all the litigation complexity and diminution of incentives to sue which concerned this Court in *Illinois Brick*, without clearly offsetting benefits in terms of compensation or other relevant criteria.[29]

2. *A "100% Pass-Through" Exception Limited To Cases In Which Direct Purchasers Have A Written Legal Obligation To Pass Through Any Overcharge Should Not Be Created*

A less exacting exception to the indirect purchaser rule which would dispense with the need to prove perfect pass through of an overcharge presents a closer question under the *Illinois Brick* criteria. Indirect purchasers could be presumed as a matter of law to have borne 100% of the overcharge if the direct purchaser is subject to a written, legally binding obligation [30] to pass on the entire amount of an overcharge. In such cases, only the indirect purchasers would have the right to recover the overcharge from the antitrust violator. Although the presumption is

on whose behalf suit was brought, see 15 U.S.C. 15e, as this Court observed in *Illinois Brick*, 431 U.S. at 747 n.31.

[29] If such an exception were justified, there would also be a strong case for an exception permitting suit where the pass on is less than 100%, but the amount can easily be proved. It is not obvious that it is intrinsically more difficult to prove a 95% pass through than to prove a 100% pass through, and the differential incentive effects may not be significant. Once the principle that a direct purchaser who is injured may sue for the entire overcharge is abandoned and indirect purchasers permitted to sue if they can prove some particular portion of the overcharge was passed on, there is no obvious stopping point short of complete abandonment of the indirect purchaser rule.

[30] Such an obligation could arise in many ways, including statute, regulation, contract, and filed tariff. The presumption, of course, would not apply if the direct purchaser is excused from the legally binding obligation by some official legislative or regulatory action or by other written modification of the obligation.

bound to be incorrect in some cases, it is likely to be correct, or nearly so, in the vast majority of cases.

Reliance on this presumption would avoid the complex task of proving the extent of pass through, substituting for it the far more judicially manageable task of proving the meaning of writings. Moreover, the meaning of the writings may often be sufficiently clear to remove uncertainty about, and litigation over, which parties have the right to sue to recover the overcharge. Thus, the efficacy of private antitrust enforcement would not suffer to the extent it would were proof of the extent of pass on necessary. Whatever benefits might result from permitting indirect purchaser suits in these limited circumstances would be available without complex and protracted litigation over who may bring suit.

The benefits of such an exception, however, are neither obvious nor compelling, and there remain costs to be considered. To be sure, permitting indirect purchasers to bring suit where the overcharge has been passed on to them may increase the extent to which these indirect purchasers are compensated for their injuries.[31] But the Court was plainly aware of this possibility when it barred suit by indirect purchasers in *Illinois Brick*. See 431 U.S. at 746-747. Moreover, in the regulatory context, pass through of portions of the direct purchaser's antitrust recovery may compensate indirect purchasers at least as well. See p. 25 & note 28, *supra*. And while indirect purchasers might have adequate incentive to sue despite their small individual stakes,[32] we have already noted

[31] Because the exception considered here does not depend on proof of actual pass on, direct purchasers would not be compensated for the portion of the overcharge they absorbed. To some, this prospect may be no more troubling than undercompensation of indirect purchasers as a result of the indirect purchaser rule (although perhaps harder to rationalize), but the failure to compensate injured direct purchasers fully does counterbalance the increased compensation of indirect purchasers under the rule here considered.

[32] Petitioners assert that the *parens patriae* mechanism remedies the Court's concern about the consequences of the small stake of the individual indirect purchaser for antitrust enforcement, Br. 20,

that the direct purchaser's incentive to sue is unlikely to vanish even if regulation requires pass through of the recovered overcharge.[33]

The costs of such an exception could be significant. Even if there is no increase in complexity related to proving a legal obligation to pass on the entire overcharge, there remain additional sources of litigation complexity. First, there is the increase in the number and diversity of status of plaintiffs, which would be no less under a rule which turns on legal obligation to pass on than under a rule which turns on proof of pass on. Second, the direct purchaser barred from recovering the overcharge presumably would, as under the other proposed exception, attempt to prove lost profits, a complex undertaking. Third, there may be substantial complexities associated with proving the individual damages of indirect purchasers.[34]

This proposed exception to the indirect purchaser rule also does not clearly single out circumstances that justify the exception from other, related circumstances. Indeed, the Seventh Circuit refused to say whether the exception it carved out would apply to other cost-plus contracts as

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but the *parens patriae* mechanism cannot remedy that concern with respect to indirect purchasers who are not natural persons and whom state attorneys general may not represent *parens patriae*.

[33] Parties to contracts which pass through overcharges are free to provide for whatever treatment of the direct purchaser's antitrust recoveries they desire. They therefore may structure their contracts to provide adequate incentive for the direct purchaser to sue and compensation for the indirect purchaser.

[34] As petitioners correctly observe, Br. 14 n.9, "aggregate" proof of damages may obviate this problem in *parens patriae* actions. However, only natural persons may be represented by state attorneys general *parens patriae*, and an alternative approach to damages may be necessary for other indirect purchasers. Moreover, the problem of proof may be difficult if the direct purchaser, although obligated to pass on the entire overcharge, is not obligated to pass on to each indirect purchaser in proportion to the amount purchased. The basis on which individual damages would then be determined is unclear.

well as to regulated contracts and cost-plus requirements contracts. Pet. App. A59. Moreover, as we have noted (note 29, *supra*), most of petitioners' arguments would apply with only marginally reduced force where regulation requires a pass through of any fixed percentage.

The issue before this Court is not whether it should abandon the indirect purchaser rule. It is whether the circumstances petitioners identify present a sufficiently compelling justification for carving out an exception to the principles of antitrust damage recovery this Court has endorsed and consistently followed since 1906. We submit that the justifications offered are not sufficiently compelling to embark on such an enterprise.

CONCLUSION

The judgment of the Tenth Circuit should be affirmed.

Respectfully submitted.

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